No. 96-653

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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January 2, 1997

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In recognizing both the great significance of the question presented and the existence of a conflict among the lower courts, respondent has effectively conceded the desirability of granting the petition for a writ of certiorari. The purpose of this reply, therefore, is simply to clarify several matters that are incorrectly set forth, or relied upon, in respondent's brief in opposition and to show that there is no barrier to the granting of the writ in this important case.

1. The question presented is ripe for consideration by this Court. General Motors ("GM") disputes whether the Full Faith and Credit issue was squarely presented below. Brief in Opposition ("Opp.") at 7, 17. Yet GM cannot and does not deny that the Eighth Circuit rested its decision to prohibit Elwell from testifying *exclusively* on the Full Faith and Credit principle. Appendix to the Petition for Writ of Certiorari ("App.") 13a-16a. Hence, the issue would be properly before this Court regardless of how the parties argued it. *See, e.g.*, *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *United States v. Williams*, 504 U.S. 36, 41 (1992).

In fact, the Full Faith and Credit question was extensively argued in both the district court and the Eighth Circuit. At trial, GM raised the Full Faith and Credit obligation as a reason to exclude the Elwell testimony. The district court analyzed GM's argument at length and rejected it, in part because it would improperly "define[] the rights of innocent third parties who have a keen interest in the information which Elwell holds." App. 28a. GM renewed its objection in the Eighth Circuit. Petitioners countered it both by noting that petitioners were not parties to the Michigan state court proceeding and by calling the court of appeals' attention to the decisions of other jurisdictions. Petition for Certiorari ("Pet.") at 9.

2. The procedural posture of the case does not prevent review. GM also argues that review is unwarranted because the

case has been remanded for retrial. Opp. at 17-18. The Eighth Circuit's decision, however, is final with respect to the Elwell testimony. Nothing in the pending proceedings will affect the Eighth Circuit's ruling on that issue. Indeed, were the plaintiffs to prevail at retrial, the Full Faith and Credit issue might be essentially unreviewable — so that an erroneous construction of federal law would be left in place as governing precedent in the Eighth Circuit. Where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern, *et al.*, SUPREME COURT PRACTICE § 4.18, at 196 (7th ed. 1993) (citing cases).

3. No privilege issue prevents review. GM suggests that the Elwell injunction is needed to prevent violations of its attorney-client and work-product privileges. Opp. at 4-5. If there were any privilege barrier to all or part of Elwell's testimony (and we believe there is not), the matter would be one for determination for the federal trial court in the first instance. The question for this Court is whether the Full Faith and Credit principle *precludes* such consideration because of a state-court judgment to which petitioners had no connection.

In any event, the injunction is much broader than any concern about privilege might warrant. Pet. at 6. The prohibition on Elwell's testimony in the instant case is a blanket one. It is not narrowly tailored to protect GM's privileges. As the district court noted, petitioners committed at trial not to seek any privileged information from Elwell. App. 22a. In fact, Elwell's testimony in *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty., Ga.), confirms the district court's finding that it would be possible for Elwell to testify without disclosing any privileged material. Pet. at 5 n.2; App. 33a.

4. GM's arguments on the merits of the case are wrong.

a. GM's extensive discussion of the "public policy"

exception to the Full Faith and Credit Clause (Opp. at 7-10) misses the point. The basic question presented is whether the Full Faith and Credit obligation precludes petitioners from calling Elwell as a witness even though they had no connection to the prior state proceeding. Only if this Court were to agree with the court of appeals that the Full Faith and Credit principle has any applicability at all would this Court even need to reach the further questions developed in the petition[1] or the "public policy" issue addressed by GM.

b. GM argues that petitioners have the option of appearing before the Michigan court to seek modification of the injunction. Opp. at 10. Far from curing the due process violation, this argument confirms it. In contending that petitioners (residents of the State of Missouri) have an obligation to seek modification of the order in a Michigan state court, GM in effect admits that, in its view, petitioners *are* governed by the Michigan injunction. If petitioners do nothing, GM asserts, they are barred from introducing Elwell's testimony in court. Yet due process commands that petitioners, as non-parties to the Michigan proceeding, may *not* be bound by the judgment there. Pet. at 12-15. It is no answer to say that the Michigan court could modify its injunction if requested to do so by the petitioners; a non-party could always ask any court to reconsider or modify a prior decision, yet that cannot justify binding the non-party to the decision. Further, GM itself all but concedes that it would be futile for petitioners to ask the Michigan court to modify its order. Opp. at 5-6, 11.

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[1] These questions include whether and to what extent the Full Faith and Credit obligation applies to injunctive decrees (a question on which there is uncertainty, as respondent appears to recognize, Opp. at 13-14), and whether the Full Faith and Credit obligation must yield in this context to other overriding principles (such as the federal interest in obtaining every man's evidence in a federal proceeding and the principle of *Donovan v. City of Dallas*, 377 U.S. 408 (1964)) — issues whose importance GM does not contest.

c. GM's surprising reliance on *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996) (*see* Opp. at 14), is not only unwarranted; it *underscores* the need for granting the petition. *Matsushita* constituted an application (in the context of a consent settlement) of the recognized principle that, when the due process requirements of *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985), are met (including notice and adequate representation), the absent members of a class will be bound by a judgment because they are treated as parties. By contrast, in this case petitioners were not parties or privies in the Michigan proceeding.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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